Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States

CONNECTICUT GENERAL LIFE INSURANCE COMPANY, *et al.*,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an administrative interpretation of an ambiguous tax regulation, advanced by IRS counsel as a litigating position in the United States Tax Court, is entitled to deference.

PARTIES TO THE PROCEEDINGS

The parties below were petitioner Connecticut General Life Insurance Company (appellant below), petitioner CIGNA Corporation and Consolidated Subsidiaries (appellant below), and respondent Commissioner of Internal Revenue (appellee below).

Connecticut General Life Insurance Company is a wholly-owned subsidiary of CIGNA Corporation, a publicly held company with no parent or publicly held company owning 10 percent or more of its stock. All of the other consolidated subsidiaries at issue are or were wholly-owned subsidiaries of CIGNA Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Connecticut General Life Insurance Company and CIGNA Corporation and Consolidated Subsidiaries respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) is reported at 177 F.3d 136. The opinion of the tax court (Pet. App. 24a) is reported at 109 T.C. 100.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 1999. On July 20, 1999, Justice Souter extended the time for filing this petition to and including August 12, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT PROVISIONS

Pertinent provisions of 26 U.S.C. §§ 1501-1505 and 26 C.F.R. § 1.1502-47 are reproduced at Pet. App. 39a.

STATEMENT OF THE CASE

This case involves interpretation of the statutes and regulations that govern the filing of consolidated federal income tax returns by affiliated companies. As the court of appeals acknowledged, these provisions are ambiguous on the specific question whether a parent company, if it has a life insurance subsidiary, can offset the income and losses of other subsidiaries recently acquired as a group. Petitioners filed tax returns based on a reasonable interpretation of the provisions at issue to permit such offsetting. During subsequent litigation against petitioners in the United States Tax Court, counsel for the Internal Revenue Service ("IRS") asserted the opposite interpretation. The question presented is whether, as the court

of appeals held, that agency litigating position is entitled to deference.

1. The Internal Revenue Code generally permits affiliated corporations to file a single "consolidated" income tax return on which, in order to reduce overall taxable income, the income of one affiliated corporation may be offset by the losses of another. 26 U.S.C. § 1501. The Code authorizes the Secretary of the Treasury to promulgate regulations under which the tax liability of an affiliated group of corporations can be appropriately computed. *Id.* § 1502. Prior to 1976, however, the Code specifically prohibited life insurance companies ("life companies") from filing consolidated returns with affiliated other companies ("nonlife companies"). Pet. App. 2a.

The Tax Reform Act of 1976 substantially loosened the restrictions against this so-called "life-nonlife" consolidation. That Act amended the Code to permit affiliated life and nonlife companies to file consolidated income tax returns for tax years beginning in 1981. *See* 26 U.S.C. § 1504(c)(2). However, the Act also imposed certain restrictions on the extent of offsetting losses within a group of affiliated life and nonlife companies. The provision directly at issue here states that the losses of a nonlife member "shall not be taken into account in determining the taxable income of a member taxed under section 801" (*i.e.*, a life member),[1] if the life member and the nonlife member have been affiliated for five years or less. *Id.* § 1503(c)(2).[2]

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[1] Section 801 of the Code, 26 U.S.C. § 801, applies only to life insurance companies.

[2] Section 1503(c)(2) provides:

> *Losses of recent nonlife affiliates.* — Notwithstanding the provisions of paragraph (1), a net operating loss for a taxable year of a member of the group not taxed under section 801 [*i.e.*, a nonlife

2. Acting pursuant to § 1502, the Secretary has promulgated an elaborate regulation addressing life-nonlife consolidation. 26 C.F.R. § 1.1502-47. One provision of that regulation defines "[l]osses of a nonlife member" within the five-year period referred to in § 1503(c)(2) as "ineligible," and further provides that such "ineligible" losses "may not be used under section 1503(c)(2) and paragraph (m) of this section to set off the income of a life member." *Id.* § 1.1502-47(d)(13). Paragraph (m) in turn contains two relevant provisions. One provision, titled "[i]neligible nonlife member," states in pertinent part that "ineligible" net operating losses ("NOL") may not "be set off against consolidated partial LICTI" (*i.e.*, life insurance company taxable income). *Id.* § 1502-47(m)(3)(vi). It further states that, "[f]or purposes of this subparagraph (3), the 'ineligible NOL' is in the year the loss arose the amount of the separate net operating loss . . . of any nonlife member that is ineligible in that year." *Id.* The other relevant provision states as follows: "*Acquired groups.* [Reserved]." *Id.* § 1.1502-47(m)(4) (brackets in original).

As originally drafted, the proposed regulations contained a predecessor of the "[i]neligible nonlife member" provision ultimately codified in paragraph (m)(3)(vi), but omitted the "[a]cquired groups" provision ultimately codified in paragraph (m)(4). *See* 47 Fed. Reg. 24,737, 24,748 (1982). In response to the proposed regulations, commenters (including

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member] shall not be taken into account in determining the taxable income of a member taxed under section 801 [*i.e.*, a life member] (either for the taxable year or as a carryover or carryback) if such taxable year precedes the sixth taxable year such members have been members of the same affiliated group (determined without regard to section 1504(b)(2)).

Section 1503(c)(1), 26 U.S.C. § 1503(c)(1), imposes other restrictions on the extent of permissible offsetting. Those restrictions are not at issue in this case.

petitioners) noted that paragraph (m)(3)(vi), read in isolation, might be construed to prohibit not only offsetting nonlife losses against life income, but also offsetting nonlife losses against *non*-life income, even among the members of a recently-acquired group that had previously filed a consolidated tax return and, accordingly, had previously engaged in such offsetting. Pet. App. 5a-6a. In direct response to that criticism, the proposed regulations were modified in three distinct ways. First, paragraph (m)(4) was added to reserve the "[a]cquired groups" issue. Second, the definition of "ineligible" nonlife losses was restricted to "subparagraph (3)," which addresses nonlife losses generally, and thus made inapplicable to subparagraph (4), which addresses "acquired group[s]" in particular. Third, the regulatory preamble was amended to record the Secretary's deliberate agnosticism on the appropriate treatment of acquired groups:

> [T]he Treasury Department will study further whether it is appropriate to aggregate the income and losses of ineligible members in certain cases. For instance, notwithstanding the ordinary reading of section 1503(c)(2), it may be consistent with the intent of section 1503(c)(2), or correct as a matter of policy, to aggregate the income and losses of ineligible members that filed a consolidated return prior to their acquisition by (and includability in) another group that files a consolidated return.

Filing of Life-Nonlife Consolidated Returns, 48 Fed. Reg. 11436, 11440 (1983).

3. Connecticut General Corporation was formerly the common parent of one life company, petitioner Connecticut General Life Insurance Company ("CGL"), and more than forty affiliated nonlife companies (collectively the "CG Group"). In 1981, the CG Group began to file a single consolidated income tax return, as permitted by the Tax Reform Act of 1976. At the same time, INA Corporation was

the common parent of over 160 affiliated nonlife companies (collectively the "INA Group"). The INA Group also filed a single consolidated income tax return. On March 31, 1982, the CG and INA Groups combined and organized petitioner CIGNA Corporation as their parent holding company. Pet. App. 3a-4a. Subsequently, a CIGNA subsidiary acquired Preferred Health Care, Incorporated, the common parent of several affiliated nonlife companies (collectively the "PHC Group"). Prior to its acquisition by CIGNA, the PHC Group also had filed a single consolidated income tax return. Pet. App. 4a. For federal income tax purposes, the CG Group was deemed to have acquired the INA Group, and CIGNA was deemed to have acquired the PHC Group. *Id.*

In preparing its consolidated income tax returns for tax years 1982 through 1985, CIGNA interpreted paragraph (m)(3)(vi) and (m)(4) only to prohibit offsetting the nonlife losses of recently acquired affiliates against the *life* income of CGL, but not to prohibit offsetting these nonlife losses against *non*-life income among companies that constituted the INA and PHC groups respectively. CIGNA's interpretation rested on several considerations: the underlying statutory rule that "[l]osses of recent nonlife affiliates . . . shall not be taken into account in determining the taxable income of a member taxed under section 801" (*i.e.*, a *life* member), 26 U.S.C. § 1503(c)(2); the definitional provision that losses of an "ineligible" nonlife member cannot be used "to set off the income of a *life* member," 26 C.F.R. § 1.1502-47(d)(13) (emphasis added); the references in paragraph (m)(3)(vi) to nonlife losses as "ineligible" for the specific purpose of being "set off against consolidated partial LICTI" (*i.e.*, *life* insurance company taxable income); the explicit reservation in paragraph (m)(4) of the "[a]cquired groups" issue; and the preamble's statement that it might be "correct" to "aggregate the income and losses of ineligible members that filed a consolidated return prior to their acquisition," *see* 48 Fed. Reg. at 11440.

CIGNA followed the offsetting method suggested in the final regulatory preamble. Because the losses of its INA and PHC members were ineligible under § 1503(c)(2), CIGNA did not use even one penny of those losses to determine or offset the income of its sole *life* member, CGL. On the other hand, CIGNA did use the nonlife losses of the unprofitable INA and PHC affiliates to offset the *nonlife* income of the profitable INA and PHC affiliates. Pet. App. 7a-8a.

4. On June 23, 1992, the Commissioner of Internal Revenue filed notices of deficiency alleging that petitioners owed the federal government $62,176,665 in unpaid income taxes and what is over $150,000,000 in interest. Pet. App. 10a-11a.[3] Petitioners sought a redetermination of the deficiency in the United States Tax Court pursuant to 26 U.S.C. § 6213(a).[4] During the ensuing litigation, counsel for the IRS asserted that paragraph (m)(3)(vi) barred CIGNA from offsetting the nonlife losses of INA and PHC affiliates not only against the life income of CGL, but also against the nonlife income of other INA and PHC affiliates. Prior to the litigation, the IRS had never before advanced this position in any regulation, ruling, or administrative practice. On a stipulated record, the tax court judge endorsed the interpretation of IRS counsel and granted summary judgment to the Commissioner. Pet. App. 24a-38a.

5. The Third Circuit affirmed.[5] At the outset of its analysis, the court of appeals acknowledged the settled rule that courts do not give any deference to agency litigating positions that are unsupported by prior "'regulations, rulings,

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[3] The notice of deficiency involved different tax years, but the same underlying dispute. Pet. App. 10a & n.1.

[4] The tax court had original jurisdiction in this case under 26 U.S.C. §§ 6214(a) and 7442.

[5] The court of appeals had jurisdiction under 26 U.S.C. § 7482(a)(1).

or administrative practice.'" Pet. App. 13a, quoting *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988). However, the court of appeals concluded that *Bowen* governs only the question of the "deference due an administrative agency's informal interpretation of a *statute*," but "does not address what deference we should accord an agency's interpretation of its own *regulations*." Pet. App. 15a (emphases added). On the latter question, the court of appeals held that *Gardebring v. Jenkins*, 485 U.S. 415 (1988), mandates deference "to an agency's interpretation of its own regulations, even when that interpretation was proffered for the first time in litigation." Pet. App. 15a. Accordingly, the court announced that it would "defer" to the IRS's litigating position in this case, unless CIGNA's competing position was "'compelled'" by the "'plain language'" of the regulations in question. *Id.* (quoting *Gardebring*, 485 U.S. at 430).

The court then concluded that the competing interpretations asserted by CIGNA and by IRS counsel were "equally likely." Pet. App. 16a. The court reasoned that paragraph (m)(4) could be construed either to reserve the "subject matter" of acquired groups, as CIGNA argued, or to reserve only "space" for some regulation that might hypothetically be promulgated in the future, as argued by counsel for the IRS. Pet. App. 15a.[6] Similarly, the court

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[6] As the court of appeals acknowledged (Pet. App. 16a), the IRS often uses the term "reserved" to make clear that related regulations are inapplicable. *See*, e.g., T.D. 8145, 1987-2 C.B. 47, 49, 56 (question "reserved" in 26 C.F.R. § 1.163-8T(h) "is not addressed" in regulations because IRS "is still studying" the relevant issues); T.D. 7311, 1974-1 C.B. 234 (regulations under 26 U.S.C. § 1232 inapplicable to "reserved" subject matter); Technical Advice Memorandum 8533003 (May 7, 1985) (same for regulations under 26 U.S.C. § 892). In concluding that paragraph (m)(4) can reasonably be construed to have no substantive significance, but to reserve only space in a numbering sequence, the court of appeals relied on a government handbook published in 1991, eight years after the consolidation regulations were actually promulgated. Pet.

concluded that there was "nothing unreasonable" with the restrictive interpretation of the preamble urged by counsel for the IRS. Pet. App. 17a. The court therefore deferred to the IRS's litigating position: "Because the interpretation advanced by the IRS is neither inconsistent with any prior interpretation of these regulations nor incompatible with their plain text, we defer to that interpretation." Pet. App. 18a; *see also* Pet. App. 23a (IRS "interpretation of that regulation is not so unreasonable as to be declared invalid by this court").

REASONS FOR GRANTING THE WRIT

This case turns on the extent of offsetting permitted under 26 U.S.C. § 1503(c)(2) and its implementing regulation, 26 C.F.R. § 1.1502-47(m)(3)(vi) and (m)(4). The court of appeals did not hold that the IRS's litigating position constitutes the *only* reasonable reading of these provisions, or even the *most* reasonable reading. Instead, it concluded that the competing interpretations asserted by IRS counsel and by CIGNA were "equally likely" (Pet. App. 16a), and it deferred to the government's interpretation on the sole ground that it was not "unreasonable" (Pet. App. 17a, 23a). This Court should review that deference holding for several reasons: it creates two independent splits of authority in the courts of appeals, it is inconsistent with numerous decisions of this Court, and it addresses administrative law and tax questions of surpassing practical importance in this and thousands of other cases.

App. 16a. When those regulations were actually promulgated, however, the available edition of the same handbook did not discuss the term "reserved." *See generally* Office of Federal Register, *Federal Register Document Drafting Handbook* (rev. ed. 1980).

I. THE DECISION BELOW CREATES TWO INDEPENDENT CIRCUIT SPLITS

The decision below creates circuit splits on important and related questions of administrative law and taxation. The administrative law question involves whether agency litigating positions are entitled to deference. The tax question involves competing interpretive principles for resolving ambiguity in the specific context of tax law. This Court should grant review to resolve those splits.

A. The Courts Of Appeals Are Divided On Whether *Bowen* Applies To Agency Litigating Positions Interpreting Ambiguous Regulations, As Opposed To Statutes

In *Bowen*, this Court held that "[d]eference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate." 488 U.S. at 213. Accordingly, the Court concluded, courts must not defer to "agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice." *Id.* at 212-13. Despite the breadth of this Court's language, the court of appeals explicitly restricted *Bowen* to agency litigating positions interpreting ambiguous statutes, and explicitly held *Bowen* inapplicable to agency litigating positions interpreting ambiguous regulations. Pet. App. 15a. At least five other courts of appeals, however, have held that *Bowen* applies to both kinds of agency litigating positions.

In *Harco Holdings, Inc. v. United States*, 977 F.2d 1027 (7th Cir. 1992), the Seventh Circuit applied *Bowen* to reject an IRS litigating position interpreting the term "unpaid losses" as used in 26 U.S.C. § 801(a)(2) and 26 C.F.R. § 1.801-3(g) (1991). In its analysis, the court specifically noted that there was "sufficient ambiguity in the statute *and the regulations* that we might defer to the Service's interpretation." 977 F.2d at 1035 (emphasis shifted). However, the court concluded,

such deference "does not apply to 'agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.'" *Id.* (quoting *Bowen*, 488 U.S. at 212). Applying *Bowen*, the court held that, because the IRS's interpretation "of section 801 and regulation 1.801-3(g)" was "new and unsupported by agency practice or rulings," it "deserve[d] no deference." *See id.* at 1035-36.

The Fifth Circuit adopted an identical position in *CSI Hydrostatic Testers, Inc. v. CIR*, 62 F.3d 136 (5th Cir. 1995) (per curiam). That case applied *Bowen* to reject an IRS litigating position interpreting 26 U.S.C. § 312(1) and 26 C.F.R. § 1502-32. The tax court in *CSI Hydrostatic*, despite acknowledging the general rule that "an agency's interpretation of its own regulation is entitled to deference," concluded that, "in the absence of a contrary published, or at least longstanding, interpretation of the regulation in question, deference is not the rule." 103 T.C. 398, 408-09 (1994) (citing *Bowen*, 488 U.S. at 212); *see also id.* at 409 ("[U]nless an agency's interpretation of a statute *or a regulation* is a matter of public record and is an interpretation on which the public is entitled to rely when planning their affairs, it will not be accorded any special deference." (emphasis added)). Applying that principle, the tax court did not give "any deference" to the IRS's litigating position. *Id.* at 409. On appeal, the Fifth Circuit explicitly "adopt[ed] that opinion." 62 F.3d at 136 ("We agree with the tax court's thorough opinion . . . .").

The Eleventh Circuit also has refused to defer to agency litigating positions interpreting ambiguous regulations. *William Brothers, Inc. v. Pate*, 833 F.2d 261 (11th Cir. 1987), involved interpretation of the term "coal mine dust" as used in the Black Lung Benefits Act and its implementing regulation. Despite explicitly noting that the regulation in question was ambiguous (*id.* at 265 n. 2), the Eleventh Circuit refused to defer to an agency litigating position broadly construing that regulation. The court explained: "[W]e do not agree that the

Director's mere litigating position is entitled to be given deference. Common sense tells us that if deference were always given to the Director's litigating position, then claimants would be effectively denied the right to appellate review." *Id.* at 265; *accord, e.g., Bradberry v. Director, Office of Workers' Compensation Programs*, 117 F.3d 1361, 1366 (11th Cir. 1997) (no deference to agency "litigating position" interpreting ambiguous regulation); *McKee v. Sullivan*, 903 F.2d 1436, 1438 n.3 (11th Cir. 1990) (same, citing *Bowen*).

Finally, the Eighth and Ninth Circuits also have refused to give deference to agency litigating positions interpreting ambiguous regulations. In *Brewster v. Sullivan*, 972 F.2d 898, 900-02 (8th Cir. 1992), the Eighth Circuit refused to defer to an administrative interpretation regarding the elements of proof under 20 C.F.R. § 404.721(b). The court expressly "acknowledge[d] that as a general rule an agency's interpretation of its own regulation is entitled to great deference," but held that, nonetheless, "courts do not defer to an agency's litigating position." 972 F.2d at 901. Similarly, in *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 558-59 (9th Cir. 1995), the Ninth Circuit refused to defer to an administrative interpretation of the Clean Air Act and its implementing regulations, despite explicitly concluding (*id.* at 558) that the regulation at issue was ambiguous. The court explained that its conclusion was "not inconsistent with the proposition that deference is ordinarily owed to an agency's interpretation of its own regulations," because "[n]o deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigating position." *Id.* at 559.[7]

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[7] The Sixth Circuit also has strongly suggested that courts must not defer to an "'agency litigating position'" interpreting "existing regulations." *Longhi v. Animal & Plant Health Inspection Service*, 165 F.3d 1057, 1061

B. The Courts Of Appeals Are Divided On The Appropriate Interpretive Principle For Resolving Ambiguity In The Context Of Tax Law

In the tax context specifically, courts confronted with ambiguity must choose between two competing interpretive principles. In this case, the Third Circuit adopted and applied the principle that IRS litigating positions are entitled to deference, thus resolving all ambiguity in favor of the government. Several other courts of appeals, however, continue to apply the venerable and diametrically opposite principle that ambiguity should be resolved in favor of the taxpayer. This Court should grant review to determine which of these competing principles is appropriate.

In *Duke Energy Natural Gas Corp. v. CIR*, 172 F.3d 1255, 1259-61 (10th Cir. 1999), the Tenth Circuit recently refused to defer to an agency litigating position construing ambiguous terms in a controlling revenue procedure.[8] The court invoked and applied the principle that "'if doubt exists as to the construction of a taxing [provision], the doubt should be resolved in favor of the taxpayer.'" *Id.* at 1260 n. 7 (quoting *Hassatt v. Welch*, 303 U.S. 303, 314 (1938)). Finding "no

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(6th Cir. 1999) (quoting *Bowen*, 488 U.S. 212); *see also United Transportation Union v. Dole*, 797 F.2d 823, 831-32 (10th Cir. 1986) (Logan, J., concurring) (no deference to administrative interpretation of regulation because "there is nothing in the record to suggest that the agency has taken the position it now advocates before this litigation arose"). The Federal Circuit has extended these principles even farther. In *AMP Incorporated and Consolidated Subsidiaries v. United States*, No. 98-5083, 1999 WL 587934, at *5 (Fed. Cir. Aug. 2, 1999), that court refused to defer to an IRS interpretation of an ambiguous tax regulation expressed in a revenue ruling issued "at a time when the IRS is *preparing* to litigate" (emphasis added).

[8] A revenue procedure is a regulatory document "'published for the information and guidance' of taxpayers as well as the IRS." 172 F.3d at 1259 (quoting 26 C.F.R. § 601.601(d)(2)(i)(a)).

clear mandate" and no "explicit" support for the IRS's litigating position, the court rejected that position and construed the revenue procedure in favor of the taxpayer. *See id.* at 1260-61.

The same interpretive principle was also dispositive in *Security Bank Minnesota v. CIR*, 994 F.2d 432, 436 (8th Cir. 1993), in which the Eighth Circuit invoked and applied the rule that "when there is a reasonable doubt about the meaning of a revenue statute, the doubt is resolved in favor of those taxed." The court expressly concluded that the operative tax provision (26 U.S.C. § 1281) was "ambiguous" on the question presented. *Id.* at 437. In these circumstances, the court refused to defer to the IRS's litigating position:

> [B]ecause the application of § 1281 to these loans is ambiguous, we follow the venerable rule that "[i]n the interpretation of statutes levying taxes . . . [courts must not] enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt, they are construed most strongly *against* the Government, and in favor of the citizen."

Id. at 441 (quoting *Gould v. Gould*, 245 U.S. 151, 153 (1917) (emphasis added; other alterations by the *Security Bank* court)).

The Sixth Circuit adopted and applied the same approach in *Weingarden v. CIR*, 825 F.2d 1027 (6th Cir. 1987). That case too confirmed that "[t]he general canon of construction is that statutes imposing a tax are interpreted liberally (in favor of the taxpayer)." *Id.* at 1029. Faced with ambiguity, the Sixth Circuit applied that principle, and thus rejected the litigating position of the IRS. *See id.* ("we construe the hopeless ambiguity created by this statutory scheme in favor of the taxpayer").

Finally, the Federal Circuit, which has exclusive jurisdiction over all tax cases arising in the Court of Federal Claims (28

U.S.C. § 1295(a)(3)), repeatedly has made clear that IRS litigating positions are not entitled to deference. Like these other appellate courts, the Federal Circuit has concluded that ambiguity in tax provisions must be resolved not in favor of the agency litigating position, but in favor of the taxpayer. *See, e.g., Xerox Corp. v. United States*, 41 F.3d 647, 658 (Fed. Cir. 1994) ("As a special rule in tax cases, 'if doubt exists as to the construction of a taxing statute, the doubt must be resolved in favor of the taxpayer.'" (quoting *Hassett*, 303 U.S. at 314)), *cert. denied*, 516 U.S. 817 (1995); *Union Pacific Corp. v. United States*, 5 F.3d 523, 525 (Fed. Cir. 1993) ("the Supreme Court counsels to construe any reasonable doubts about the meaning of a tax statute in favor of the taxpayer" (citing *Gould*, 245 U.S. at 153)); *Ocean Drilling & Exploration Co. v. United States*, 988 F.2d 1135, 1157 (Fed. Cir. 1993) ("if there is a doubt as to the meaning of the provisions of the Internal Revenue Code, the doubt 'must be resolved in favor of the taxpayer'" (citation omitted)).[9]

C. These Splits Are Exacerbated By The Multi-Track Scheme For Judicial Enforcement Of Federal Tax Liabilities

Although circuit splits this deep would warrant the Court's attention in any event, the tax context presents two distinctive

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[9] Other courts of appeals have also invoked and applied these principles. *See, e.g., Greyhound Corp. v. United States*, 495 F.2d 863, 869 (9th Cir. 1974) ("Here, it is proper to invoke the well known rule of construction that in cases of doubt, a taxing statute must be construed most strongly in favor of the taxpayer and against the government."); *Lilly v. United States*, 238 F.2d 584, 587 (4th Cir. 1956) ("It is well settled that taxing statutes are strictly construed against the government and in favor of the taxpayer."); *Allen v. Atlanta Metallic Casket Co.*, 197 F.2d 460, 461 (5th Cir. 1952) (applying "the principle that taxes may not be exacted unless clearly due, and in case there is doubt, the taxpayer must be given the benefit of it").

features that make review even more essential to the proper functioning of the federal judicial system.

First, decisions of the tax court are appealable to the regional courts of appeals in which the taxpayer has its legal residence or principal place of business. 26 U.S.C. § 7482(b). The residence of the taxpayer thus determines, in any particular case, what body of appellate precedent is binding on the tax court. *See Golsen v. Commissioner*, 54 T.C. 742, 756-57 (1970), *aff'd*, 445 F.2d 985 (10th Cir.), *cert. denied*, 404 U.S. 940 (1971). Therefore, when the courts of appeals are divided, the consequence is not only disparate results among *different* courts, but, even worse, disparate results within the *same* court. *See, e.g.*, N. Crimm, *Tax Court Litigation: Practice and Procedure* ¶ 2.4[2][g], at 2-101 (1999) ("[T]he *Golsen* rule means that cases before the Tax Court involving similar facts and identical legal issues result in inconsistent conclusions when the separate circuit courts have treated the issues in differing manners.").

Second, taxpayers have a choice from among three possible judicial fora: if a taxpayer declines to pay an alleged deficiency, it may seek a "redetermination" of the deficiency in the tax court (26 U.S.C. § 6213(a)); on the other hand, if a taxpayer elects to pay the alleged deficiency, it may seek "recovery" of the disputed amount either in an appropriate district court or in the Court of Federal Claims (28 U.S.C. § 1346(a)(1)). Given the decision below, a shrewd and affluent Philadelphia taxpayer will pay the deficiency and litigate for "recovery" in the Court of Federal Claims, thus purchasing favorable Federal Circuit precedent under which all ambiguous regulations are construed in favor of the taxpayer. On the other hand, an unwise or impecunious Philadelphia taxpayer might still seek (or be forced to seek) a "redetermination" in the tax court, subject to the unfavorable precedent that all ambiguous regulations are construed in

favor of IRS litigating positions. This Court should not tolerate circuit splits that invite such law-shopping.

II. THE DECISION BELOW CONFLICTS WITH BASIC ADMINISTRATIVE LAW AND TAX PRINCIPLES ADOPTED BY THIS COURT

The court of appeals concluded that, where a tax regulation is ambiguous, courts must defer to any minimally reasonable interpretation asserted by IRS counsel in litigation before the tax court. Pet. App. 13a-15a. That conclusion conflicts with scores of this Court's administrative law and tax cases. Moreover, the court of appeals erred in asserting that *Gardebring* even remotely supports this startling result.

A. Agency Litigating Positions, Whether Interpreting Ambiguous Statutes Or Regulations, Are Not Entitled To Deference

Under basic administrative law principles, courts generally must defer to an agency's reasonable interpretation of an ambiguous statute, *see, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-44 (1984), or an ambiguous regulation, *see, e.g., Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945), that the agency is entrusted to administer. Under *Bowen*, however, *Chevron* deference is "entirely inappropriate" when the only administrative interpretation at issue is a "litigating position" asserted by agency counsel. *See* 488 U.S. at 212-13. There is no conceivable reason why the opposite rule should apply to agency litigating positions asserted to warrant deference under *Seminole Rock*.

1. The justifications for *Chevron* and *Seminole Rock* are identical. *Chevron* reflects an interpretive presumption that, because of an agency's relative expertise and political accountability, "Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the

agency." *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996); *accord, e.g., Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) ("A precondition to deference under *Chevron* is a congressional delegation of administrative authority."). The justification for *Seminole Rock* deference is essentially identical: "Because applying an agency's regulation to complex or changing circumstances calls upon the agency's unique expertise and policymaking prerogatives, we presume that the power authoritatively to interpret its own regulations is a component of the agency's delegated lawmaking powers." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991); *accord, e.g., Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696-97 (1991) (*Chevron* analysis "informs our determination that deference [under *Seminole Rock*] is appropriate"); Manning, *Constitutional Structure and Judicial Deference To Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 613 (1996) (*Chevron* and *Seminole Rock* doctrines "are functionally similar"); Anthony, *The Supreme Court and the APA: Sometimes They Just Don't Get It*, 10 Admin. L.J. Am. U. 1, 5 (1996) ("there should be no difference for present purposes between interpretations of regulations and interpretations of statutes"). Given the functional and analytical similarities between these deference doctrines, it is highly implausible that they should apply differently in the context of agency litigating positions.

In *Bowen* and its progeny, this Court repeatedly has refused to defer to agency litigating positions. Several considerations support these decisions. To begin with, Congress presumptively delegates administrative and interpretive power to the agency itself, and not to its counsel. *See Bowen*, 488 U.S. at 213. Moreover, the litigating positions asserted by low-level and partisan agency counsel are unlikely to reflect the views of the agency at all, much less its considered views. *See Smiley*, 517 U.S. at 741 ("The deliberateness of such positions, if not indeed their authoritativeness, is suspect."); Scalia, *Judicial Deference To Administrative Interpretations*

of Law, 1989 Duke L.J. 511, 519 ("there may be reason to doubt whether the position taken by a low-level agency litigator, or perhaps even by the general counsel, has the approval of the agency head"). Finally, deferring to the litigating position of a party agency would violate basic norms of impartial adjudication that the federal courts preserve and embody. *See, e.g.*, *Stutson v. United States*, 516 U.S. 163, 187 (1996) (Scalia, J., dissenting) (*Bowen* reflects "a decent concern for those litigating against the government"); Scalia, 1989 Duke L.J. at 519-20 ("Whatever else an agency's choice among the various interpretive options may be based upon, it should not be based upon the desire to win a particular lawsuit."); Anthony, *Which Agency Interpretations Should Bind Citizens And The Courts?*, 7 Yale J. Reg. 1, 60-61 (1990) ("Even the cynical should balk at assuming that Congress has delegated such a power to judge one's own cause."). Although *Bowen* on its facts involved a litigating position interpreting an ambiguous statute, these considerations are fully applicable to litigating positions interpreting ambiguous regulations.

Finally, although this Court has not addressed the question in detail, it has twice stated that *Seminole Rock* deference should not extend to agency litigating positions. In *Martin v. OSHRC*, the Court, in explaining the rationale for *Bowen*, stated that "[b]ecause statutory *and regulatory* interpretations furnished [in litigation] occur after agency proceedings have terminated, they do not constitute an exercise of the agency's delegated lawmaking powers." 499 U.S. at 156-57 (emphasis shifted). Similarly, in *Cottage Savings Association v. CIR*, 499 U.S. 554, 562-63 (1991), the Court explained that the question of what constitutes a "material difference" under 26 C.F.R. § 1.1001-1 "is not one on which we can defer to the Commissioner," precisely because "the Commissioner has not issued an authoritative, *prelitigation* interpretation of what property exchanges satisfy this requirement" (emphasis added).

2. These principles plainly apply to IRS litigating positions asserted in the United States Tax Court, which Congress constituted not as an executive or independent agency, but as an Article I "court of record" (26 U.S.C. § 7441). Accordingly, this Court has stressed its exclusively judicial nature: "The Tax Court exercises judicial, rather than executive, legislative, or administrative, power. It was established by Congress to interpret and apply the Internal Revenue Code in disputes between taxpayers and the Government." *Freytag v. CIR*, 501 U.S. 868, 890-91 (1991). Because its "function and role in the federal judicial scheme closely resemble those of the federal district courts" (*id.*), deference to agency litigating positions is equally inappropriate in the tax court as it would be in a district court.

The allocation of authority within the executive branch further undercuts the argument for extending *Seminole Rock* deference to agency litigating positions in tax cases. Congress delegated rulemaking and therefore interpretive authority to the Secretary of the Treasury (26 U.S.C. § 1502), who in turn has delegated that authority to the Commisioner of Internal Revenue (26 C.F.R. § 301.7805-1(a)) and to the Assistant Secretary for Tax Policy (*see* Coverdale, *Court Review of Tax Regulations and Revenue Rulings in the Chevron Era*, 64 Geo. Wash. L. Rev. 35, 51 (1995)). On the other hand, depending on the taxpayer's litigation strategy, the government's litigating positions might be asserted by an attorney in the Office of District Counsel for IRS (in tax court), by an attorney in the Department of Justice Tax Division (in district court), or by an attorney in the Department of Justice Court of Federal Claims Section. *See* N. Crimm, *supra*, ¶ 2.4[4][c], at 2-111. Given these diffuse rulemaking and litigation responsibilities, it is particularly

implausible that any of the latter staff attorneys can be presumed to speak for all of the former policymakers.[10]

3. Apart from its various other legal shortcomings, the decision below also threatens to eviscerate *Bowen* itself. Interpretive questions cannot be neatly categorized as either statutory or regulatory. Usually, the interpretation at issue addresses the putative scope of both the statute and its implementing regulations: for example, what constitutes "unpaid losses" under the Tax Code and its implementing regulations (*see Harco Holdings*, 977 F.2d at 1029-30 & n.5, 1034-36 & n.12); what constitutes "coal mine dust" under the Black Lung Benefits Act and its implementing regulations (*see William Bros.*, 833 F.2d at 264-65); or what constitutes a "default" under the Truth in Lending Act and its implementing regulations (*see Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 561 (1980)). Similarly, this case involves the related interpretive questions what constitutes impermissible offsetting "in determining the taxable income of a [life] member" under 26 U.S.C. § 1503(c)(2) (Pet. App. 18a-23a) and what constitutes "ineligible" losses that cannot "be set off against consolidated partial [life insurance company taxable income]" under 26 C.F.R. § 1.1502-47(m)(3)(vi) and (m)(4) (Pet. App. 15a-18a). Under *Bowen*, an agency litigating position addressed solely to the former question plainly would warrant no deference. Under the decision below, however, an agency litigating position addressed to *both* questions *does* warrant deference, because *Bowen* is held inapplicable to the

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[10] In the litigation below, the government insisted that the Assistant Secretary for Tax Policy has "exclusive authority to make final determinations of the Treasury's position" and that this official "expresses his Department's institutional views through formally promulgated rules and regulations." Brief of Appellee at 33, *Connecticut General Life Ins. Co. v. CIR*, No. 97-7612 (3d Cir. May 29, 1998). Those assertions simply underscore the inappropriateness of deferring to the litigating positions asserted by a staff attorney in a local IRS office.

latter question (Pet. App. 14a-15a), and because the former question is defined not as testing the litigating position against the statute, but as testing only the implementing regulation (as "interpreted" by the agency, Pet. App. 18a) against the statute. Put more bluntly, the court of appeals' decision permits any agency to exempt itself from *Bowen* simply by copying or paraphrasing its organic statute in any of its implementing regulations. That cannot be the law.

B. This Court Has Long Held That Ambiguous Tax Provisions Must Be Construed In Favor Of The Taxpayer

Recognizing that "the power to tax involves the power to destroy," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819), this Court has long applied special rules of construction in the taxation context. *See County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 258 (1992). One of those rules is that ambiguous tax provisions (whether statutes or regulations) must be construed in favor of the taxpayer.

In *Gould v. Gould*, 245 U.S. 151, 153 (1917), this Court unanimously adopted the principle that, "[i]n case of doubt," ambiguous tax provisions "are construed most strongly against the Government, and in favor of the citizen." Finding "obscurity" in the governing provision, the Court rejected the litigating position of the government, and held that the operative definition of "income" did not include the alimony payments at issue. *See id.* Similarly, in *Reinecke v. Northern Trust Co.*, 278 U.S. 339, 348 (1929), this Court, after finding it "doubtful" whether or not the governing provision encompassed the trusts at issue, rejected the litigating position of the government and held, citing *Gould*, that "[t]hat doubt must be resolved in favor of the taxpayer." Legions of cases have reaffirmed these principles. *See, e.g., Hassett v. Welch*, 303 U.S. 303, 314 (1938) ("if doubt exists as to the construction of a taxing statute, the doubt should be resolved

in favor of the taxpayer"); *White v. Aronson*, 302 U.S. 16, 20 (1937) ("Where there is a reasonable doubt as to the meaning of a taxing Act it should be construed most favorably to the taxpayer."); *Burnet v. Niagara Falls Brewing Co.*, 282 U.S. 648, 654 (1931) ("It is a familiar rule that tax laws are to be liberally construed in favor of taxpayers."); *United States v. Merriam*, 263 U.S. 179, 188 (1923) ("If the words [of a tax provision] are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer.").

The court of appeals created an opposite interpretive presumption. It concluded that ambiguity in tax regulations must be resolved in favor of the *government*, through deference to its litigating positions. The court of appeals thus not only ignored, but in fact inverted, a fundamental rule of construction embraced by this Court for decades. On that ground alone, further review is warranted.

C. *Gardebring* Provides No Support For The Court Of Appeals' Holding

Against all of these administrative law and tax decisions, the court of appeals relied solely on this Court's decision in *Gardebring v. Jenkins*, 485 U.S. 415 (1988), which it construed as mandating deference to agency litigating positions interpreting ambiguous regulations. Pet. App. 15a. *Gardebring* does not remotely support that holding.

As an administrative law matter, *Gardebring* falls within a narrow exception to *Bowen* that is plainly inapplicable here. In *Gardebring*, the agency was not a *party* to the underlying litigation, but appeared only in this Court, only as an *amicus*, and only at this Court's request. *See* 485 U.S. at 416. Although *Gardebring* did not discuss the question of agency litigating positions in any detail, a subsequent case involving Supreme Court *amicus* briefs explained that, in that limited context, there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on

the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1998). Like *Gardebring*, *Auer* involved the question whether an agency litigating position interpreting an ambiguous regulation is entitled to deference. *See id.* at 461-62. This Court distinguished *Bowen* not on the broad ground that *Bowen* is inapplicable to administrative interpretations of ambiguous regulations, as the court of appeals would have it, but only on the narrow ground that, "in the circumstances" of an invited Supreme Court *amicus* brief, the litigating position might plausibly reflect the "fair and considered judgment" of the agency itself. *See id.* at 462. That rationale is plainly inapplicable to the positions asserted by partisan counsel representing the IRS as a party in a trial court proceeding.

In any event, neither *Gardebring* nor *Auer* was a tax case: *Gardebring* involved construction of AFDC regulations by the Secretary of Health and Human Services (485 U.S. at 427-30), and *Auer* involved construction of FLSA regulations by the Secretary of Labor (519 U.S. at 461-63). Neither decision can even remotely be read as mandating deference to agency litigating positions in tax cases, and thus silently overruling the entire case line of *Gould* and its progeny.

III. IF NOT CORRECTED, THE DECISION BELOW WILL HAVE SWEEPING AND TROUBLING CONSEQUENCES

The breadth and significance of the decision below are difficult to overstate. By its terms, the court of appeals' holding applies to any interpretive dispute regarding any term that appears in the Code of Federal Regulations. The decision below thus controls a potentially limitless range of issues, including not only interpretations of the Tax Code by the IRS, but also, to name only a few possible examples, interpretations of Department of Defense regulations by the Navy, *see United States v. Larionoff*, 431 U.S. 864, 872 (1977); interpretations of the Sentencing Guidelines by the United States Sentencing Commission, *see Stinson v. United States*, 508 U.S. 36, 45

(1993); and interpretations of Medicare regulations by the Secretary of Health and Human Services, *see Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 94-95 (1995). Because there are far more regulations than statutes, *Seminole Rock* is at least as important as *Chevron*, *see* Manning, 96 Colum. L. Rev. at 696, which makes this case at least as important as *Bowen*.

The decision below also effectively decides all *Seminole Rock* questions about what informal *pre*-litigation interpretations are entitled to deference. This Court has not made clear the extent to which such informal interpretations are entitled to deference. *See, e.g., Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 138 n.9 (1995) (interpretation must be "embodied in [a] regulation or similarly binding policy statement" to warrant deference); *City of Chicago v. Environmental Defense Fund*, 511 U.S. 328, 339 n.5 (1994) (reserving question whether "agency interpretation expressed in a memorandum" is entitled to deference); *see generally* Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals and the Like — Should Federal Agencies Use Them To Bind The Public?*, 41 Duke L.J. 1311 (1992). The decision below, however, effectively moots any *Seminole Rock* question about informal pre-litigation interpretations because, even if no such interpretations exist, the agency litigating position is itself nonetheless entitled to deference.

The decision below also will exacerbate the problem of daunting complexity in the tax law. Late in his life, the leading tax lawyer of this century concluded that tax law had become "bewildering," Griswold, 11 ABA Sec. Tax'n Newsl. 56, 57 (1992), and even "monstrous," Griswold, *Is the Tax Law Gone To Seed*, 11 Am. J. Tax Pol'y 1, 9 (1994). Justice O'Connor has similarly expressed frustration with the "maze of regulations" promulgated by the IRS. *CIR v. Estate of Hubert*, 520 U.S. 93, 122 (1997) (opinion concurring in the

judgment).[11] This system has developed even though, under *Gould* and its progeny, the IRS properly bears the risk of any ambiguity in its own regulations. By inverting *Gould*, the court of appeals not only eliminated that modest structural check, but also created affirmative incentives for even more regulatory vagueness and complexity. As Justice Thomas has explained: "It is perfectly understandable . . . for an agency to issue vague regulations, because to do so maximizes agency power and allows the agency greater latitude to make law through adjudication rather than through the more cumbersome rulemaking process." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994) (dissenting opinion).[12]

Finally, the decision below will undercut many of the protections that Congress has afforded to taxpayers. As explained above, Congress provided for the application of tax regulations to be determined through independent adjudication

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[11] Commentators have frequently noted this problem. *See, e.g.*, A. Dubroff *et al.*, *Federal Income Taxation of Corporations Filing Consolidated Returns* § 2.02, at 2.7 (2d ed. 1999) (tax regulations "have resulted in complexity that is often unworkable for all but the most sophisticated taxpayer"); Dembitzer, *Beyond the IRS Restructuring and Reform Act of 1998: Perceived Abuses of the Treasury Department's Rulemaking Authority*, 52 Tax. Law. 501, 518 (1999) ("It is beyond cavil that many provisions in Treasury Regulations are complicated and difficult to decipher."); Schwidetzky, *Hyperlexis and the Loophole*, 49 Okla. L. Rev. 403, 404 (1996) ("Tax law is, of course, a case of hyperlexis run extraordinarily amok."). The life-nonlife consolidation regulations, which can fairly be characterized as impenetrable provide ample support for that criticism. *See* Pet. App. 42a-71a.

[12] Recently, the IRS has adopted the tactic of issuing so-called "anti-avoidance" or "anti-abuse" regulations, which impose liability on transactions that comply with all applicable laws, but are designed to "avoid the purposes of underlying regulations." Dubroff, *supra* note 11, § 2.01, at 2-1; *see also* Olson, *Some Thoughts on Anti-Abuse Rules*, 48 Tax Law. 816 (1995). If courts defer to litigating positions interpreting these regulations, then the IRS's enforcement powers will be virtually unbounded.

by courts constituted outside the executive branch. *See Freytag*, 501 U.S. at 890-91. Moreover, in the consolidated return context in particular, Congress specifically required tax regulations to be "clea[r]" (26 U.S.C. § 1502) and to be promulgated "prior to" the due date for the returns at issue (*id.* § 1503(a)). Despite these principles, the court of appeals upheld a $200 million tax liability (including primarily accrued interest), based on an interpretation asserted by partisan agency counsel in litigation conducted seven years after the tax years in question, and on a bare judicial determination that counsel's position was not entirely "unreasonable." The patent unfairness of that decision, and its inconsistency with the controlling principles of tax and administrative law, could not be more self-evident.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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